IN THE

Supreme Court of the United States

October Term, 1979

No. 79-353

CARL GELFONT,

Petitioner,

against

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AT ALLOCATUR DOCKET NO. 4241.

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CITATIONS.

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Petitioner respectfully prays that a Writ of Certiorari issue to review the final Order of the Supreme Court of the Commonwealth of Pennsylvania entered herein on June 4, 1979 affirming the opinion of the Superior Court of Pennsylvania, dated March 2, 1979 reversing the Suppression of Evidence by the Trial Court and remanding the case for Trial.

Opinions Below

The Opinion of the Trial Court, the Court of Common Pleas of Montgomery County in this case is reported at 104 Montg. Co. L. R. 368 (1978).

The Opinion of the Superior Court of Pennsylvania and the dissent is reported at 399 A. 2nd 414 (Pa. Super. 1979).

The Order of the Supreme Court of Pennsylvania affirming the Superior Court is without an accompanying opinion and as yet unreported (A copy of this Order is attached in the Appendix).

Jurisdiction

The final Order of the Supreme Court of Pennsylvania was made and entered on June 4, 1979, and is appended hereto at P. 32. The Order and Judgment of the Supreme Court ruled adversely on a Federal Constitutional question and claim of right of the Petitioner. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Questions Presented

I. Did the State Appellate Court err in not affirming the Suppression of Marijuana Evidence as required by the Fourth Amendment by its finding that the first prong of the Aguilar-Spinelli test was satisfied by a search warrant when the appellate court took judicial notice of the unproved fact that the use of marijuana is so universal that no underlying facts and circumstances need be alleged in the affidavit to the search warrant showing how the "good citizen" informant knew that the marijuana to be seized was in fact marijuana?

II. Did the Trial Court and the Appellate Court weaken the protection of the Fourth Amendment by finding that the second prong of the Aguilar-Spinelli test was satisfied, where in the application for a search warrant the only information presented to the issuing authority to establish the reliability of the informant was that the informant was never convicted of a crime, that he was a registered voter, that he was gainfully employed, and that the affiant believes him to be reliable and not subject to rash judgments, without a further showing of past information received that has resulted in arrest and or conviction or other indicia of reliability?

Constitutional Provisions Involved

AMENDMENT IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

AMENDMENT XIV SECTION 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

Statement of the Case

On February 22, 1978, Montgomery County Detective Timothy Woodward obtained a search warrant from District Justice Everett P. Arnold for a search of the defendant, Carl Gelfont's residence at 3918 Warfield Drive, Huntingdon Valley, Pennsylvania.

The issuance of said search warrant was based on the allegations by Detective Woodward that during the last twenty four hours he had met with a "confidential and reliable informant" who had advised him that he had been in the residence located at 3918 Warfield Drive, Huntingdon Valley, Pennsylvania, where he observed a large quantity of "suspected marijuana" in the possession of a white male whom he knew as Carl.

The affidavit then goes on to recite that the affiant, Detective Woodward: ". . . believes the informant to be reliable for the following reasons: the informant has never been arrested or a suspect in a crime. The informant has been gainfully employed the majority of his adult life. The informant is also a registered voter in Montgomery County."

The only other facts which are pertinent to the questions presented in this Petition are the averments contained in the application for the search warrant by Detective Woodward that he checked the Cole's Directory, The Pennsylvania Bureau of Motor Vehicles and Lower Moreland Township Tax Records to confirm the fact that Carl Gelfont lived at 3918 Warfield Drive, Huntingdon Valley, Pennsylvania.

On May 1, 1978, a timely Omnibus Pre-Trial Motion was filed requesting that the evidence be suppressed based on an illegal and invalid search warrant. The Federal Constitutional issue raised by this issue was heard by the Trial Court on June 6, 1978. On June 7, 1978 the Honorable Richard S. Lowe granted the defendant's Motion to Suppress the Evidence. An appeal was taken by the Commonwealth to the Superior Court of the Commonwealth of Pennsylvania on June 20, 1978. The Superior Court of Pennsylvania reversed and remanded the case on March 2, 1979. On March 28, 1979 the defendant appealed to the Supreme Court of Pennsylvania. On June 4, 1979 the Supreme Court of Pennsylvania affirmed *per curiam*, without opinion.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. A search warrant requirement of the Fourth Amendment of the United States Constitution will be emasculated if this decision is allowed to stand.

The consequence of this decision, if left to stand, would have serious implications for the citizens of the Commonwealth of Pennsylvania by permitting police officers to enter and search a person's home without proper safeguards to determine the reliability and trustworthiness of the confidential informant. The standard by which search warrants containing hearsay information from informants are tested for validity was set forth in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). The two prong test set forth in these decisions require that an affidavit for a search warrant must set forth underlying circumstances necessary to enable a Magistrate to independently judge on the validity of the informant's conclusion and secondly that the affiant-officers must support their claim that their informant was credible and his information reliable, so that the appropriate value of the report can be assessed. In the instant case the search warrant that was used to invade the privacy of the residence of Carl Gelfont initially was invalidated by the Trial Court based on the Trial Court's conclusion that sufficient facts and underlying circumstances regarding the informant's conclusion in the search warrant that what he observed was in fact marijuana was absent. The Superior Court of Pennsylvania reversed the Trial Court on this ground and took judicial notice of the rather improbable and ". . . unproved fact that the use of marijuana has become so universal that it is readily recognizable by law-abiding citizens" *see Commonwealth v. Gelfont*, 399 Atlantic 2d 414 (Pa. Super. 414, 416) other than the statement that the

informant saw "suspected marijuana" there is nothing contained in the affidavit to the search warrant indicating that the informant knew what marijuana looked like. The purpose of the first prong of the Aguilar-Spinelli test is to examine whether or not there is enough information in the search warrant to credit the conclusion that the informant made as reliable. It is submitted, as the dissent, correctly points out in this case that to assume that the general law abiding public knows and can distinguish marijuana from other vegetable material on sight, without a greater showing of familiarity is error. In accord with this point is *United States v. Character*, 568 F. 2d 442 (5th cir., 1978) where the Court held that an informant's conclusion that he saw stolen goods contained in the search warrant was an insufficient conclusion without a further showing of how the informant knew that the goods were in fact stolen. Similarly in the instant case the informant's conclusion that he saw marijuana is unsupported by any facts or circumstances to show that he as a law abiding citizen, knows what marijuana looks like.

This particular issue is an important one for the Court to determine since it is contrary to the general purpose of the Fourth Amendment to impose limits on the power of police to prevent arbitrary and oppressive interference with privacy and personal security of individuals. *United States v. Ortiz*, 422 U.S. 891, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975). It is further submitted that a Writ of Certiorari should be granted since an important federal question has been raised and the decision of the Courts of Pennsylvania are not in accord with the Supreme Court decisions of *Aguilar v. Texas, supra* and *Spinelli v. United States, supra.*

II. Pennsylvania Courts have dangerously expanded the ability of the police to circumvent the second prong of the Aguilar-Spinelli test by its decision.

It is submitted that the Pennsylvania Courts have ruled on an issue that has not been directly decided by the Supreme Court of the United States concerning a federal constitutional question of the validity of the "good citizen" informant. In *United States v. Harris*, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971) Justice Harlan in his dissent mentioned in passing that a good citizen ". . . may in fact be more reliable than one who supplies information on a regular basis . . ." *id.* U. S. 599 other than that brief statement in the dissent the Supreme Court has not yet ruled upon the issue of whether or not a "good citizen" can be credible on its face without a further showing of underlying facts and circumstances.

None of the standard indicia of credibility exists in this case. The suspect's reputation was not in accord with the informant's tip as admitted by the Commonwealth in its Answer to the Omnibus Pre-Trial Motion. See *United States v. Harris*, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 723 (1971). The informant was not an accomplice. *United States v. Dunloy*, 584 F. 2d 6 (2d cir. of 1978). The informant admittedly did not give prior reliable information. *United States v. Muckenthaler*, 584 F. 2d 240 (8th cir. 1978); *United States v. Scott*, 545 F. 2d 38 (8th cir. 1976) cert denied, 429 U. S. 1066, 97 S. Ct. 796, 50 L. Ed. 2d 784 (1977).

Further, the informant's statement were not against his penal interest to add credibility to those statements. *United States v. Midtaune*, 589 F.2d 370 (7th Cir. 1979).

There is also an absence of sufficient underlying facts and circumstances to show reliability. The mere fact that the individual was employed, that he had not been convicted of any crimes, that he was a registered voter and that the officer did not believe that the person was subject to rash judgments is patently insufficient to establish his hearsay statement as credible. Further, the affidavit to the search warrant is wholly deficient in its description of the criminal conduct that was occurring and the details concerning said conduct. There is nothing in the search warrant to show or to convince a Magistrate that what the informant was stating was more than a mere rumor. The only description in the warrant is of the defendant and of his residence and the fact that in his residence was some "suspected marijuana". This is contrary to the decision of *United States v. Sclamo*, 578 F. 2d 888 (1st cir. 1978).

Conclusion

The Writ of Certiorari to the Supreme Court of Pennsylvania should be granted.

Respectfully submitted,

MICHAEL J. MORRIS, JR.,
FRANK P. MURPHY,
Attorneys for Petitioner.

APPENDIX

Opinion by the Honorable Richard S. Lowe, Trial Judge of the Court of Common Pleas of Montgomery County.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

CARL GELFONT.

No. 712-78

LOWE, *P. J.*, July 24, 1978

The Commonwealth appeals an Order suppressing evidence obtained, as found by the trial court, by a constitutionally invalid search and seizure. The crimes charged are possession of a Schedule I controlled substance (marijuana) and possession with intent to deliver same. The suppressed evidence is critical to the Commonwealth's case, and it can appeal the suppression. *Commonwealth vs. Bosurgi*, 411 Pa. 56 (1963); *Commonwealth vs. Reisinger*, ... Pa. Superior Ct. ...., 380 A.2d 1250 (1977).

On February 22, 1978 Montgomery County Detective Timothy Woodward sought a search warrant for the residence of defendant Carl Gelfont. The complaint for the warrant read in pertinent part:

> During the last 24 hours affiant interviewed a confidential and reliable informant. The information received from the confidential and reliable informant was that during the last 48 hours, while he (the informant) was present inside the residence located at 3918 Warfield Drive, Huntingdon Valley, he (the informant) observed a large quantity of suspected marijuana. The marijuana was in the possession of a white male known to the informant as Carl . . . Affiant checked the "Coles Directorey" [sic] and learned thru that directory that the residence at 3918 Warfield Drive, Huntington Valley is owned by a Carl Gelfont and learned that a Pennsylvania Operators License is issued to a Carl Gelfont, d.o.b. 2/9/42, 3918 Warfield Drive, Huntington Valley. Affiant believes the informant to be reliable for the following reasons: The informant has never been arrested or a suspect in a crime. The informant has been gainfully employed for the majority of his adult life. The informant is also a registered voter in Montgomery County . . .

After a determination of probable cause, District Justice Everett P. Arnold issued the warrant.

Detective Woodward proceeded to the defendant's residence, executed the warrant, seized contraband, and arrested the defendant for violations of the Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P. L. 233, 35 P. S. 780-113 (a) (16), (30).

The sole issue on appeal is whether or not sufficient evidence was presented the issuing authority to establish probable cause justifying issuance of the search warrant under the two-pronged test established in *Aguilar vs. Texas*, 378 U. S. 108 (1964), and explicated in *Spinelli vs. United States*, 393 U. S. 410 (1969).

> The first requirement is an explanation of the 'underlying circumstances' from which the informant received the information and reached the conclusion that fruits of a crime would be located in the place to be searched. Secondly, there must be set forth in the affidavit a reasonable basis for the affiant's belief that his informant is credible and his information reliable.

Commonwealth vs. Reisinger, supra, 380 A.2d 1250, 1252. See also *Commonwealth vs. Davis*, 466 Pa. 102 (1976); *Commonwealth vs. Forster*, ... Pa. Superior Ct. ....., 385 A.2d 416 (1978).

Each prong of the test must be analyzed separately. The first requirement is an explanation of the underlying circumstances which caused the informant to believe that fruits of a crime would be found. This warrant merely states that the informant "observed a large quantity of *suspected* marijuana." [emphasis added]. The affidavit stated that the suspected marijuana was in the possession of a certain individual named Carl at a designated location. This portion of the affidavit lacks the requisite underlying "facts or circumstances" which gave rise to the informant's conclusions. There is nothing in the affidavit to indicate that the informant had any expertise in marijuana or that he could distinguish marijuana from other vegetable substances of similar appearance and characteristics. Unquestionably, before a lay informant's opinion can support the issuance of a search warrant, it must be demonstrated he has had some prior

elementary experience with the subject matter of the opinion. The Supreme Court of the United States forbids issuance of a warrant on mere affirmance or belief. In *Nathanson vs. United States*, 290 U. S. 41 (1933), a warrant was issued upon the sworn allegation that the affiant "has cause to suspect and does believe" that certain merchandise was in a specified location. The Court stated:

> Under the Fourth Amendment an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

Id. 47. See also *United States vs. Harris*, 403 U. S. 573 (1971). The informant merely suspected that marijuana was present at defendant's residence. Mere affirmance is insufficient. There is no allegation that the informant, a reputable, law-abiding citizen, had any knowledge of marijuana. It cannot be assumed that marijuana is such a common, every day substance that it is readily and universally recognizable. Expert witnesses are often called upon to identify marijuana. *United States vs. Moore*, 446 F.2d 448 (3rd Cir. 1971), *cert. denied*, 406 U. S. 909 (1971). The meager, unconfirmed, and unsubstantiated allegations identifying the *suspected* contraband as marijuana are insufficient to satisfy the first prong essential to establishing probable cause.

The leading case analyzing the second requirement of the *Aguilar* test is *United States vs. Harris, supra.* The courts of Pennsylvania have reviewed the requisite standards in determining whether or not there is a substantial basis for crediting hearsay:

1) Did the informant give prior reliable information?

2) Was the informant's story corroborated by any other source?

3) Were the informant's statements a declaration against interest?

4) Does the defendant's reputation support the informant's tip?

Commonwealth vs. Ambers, 225 Pa. Superior Ct. 381 (1973); *Commonwealth vs. Reisinger, supra.* None of the aforementioned factors is present in the instant case. However, these factors were not "intended by the *Harris* court to be the only factors which could conceivably provide a basis for crediting the hearsay.[1] To apply this 'checklist' in a mechanical manner would deprive a reviewing court of the opportunity to use its 'common sense' as urged the Court in *United States vs. Ventresca* [380 U. S. 102 (1965)] . . ." *Commonwealth vs. Reisinger, supra*, 380 A.2d 1250, 1253.

This Court concludes that there is sufficient evidence to determine that the second requirement of *Aguilar* was met. The informant was reliable because he had never been arrested or a suspect in a crime, is gainfully employed, and is a registered elector in Montgomery County.

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[1] Justice Harlan's dissent in *Harris vs. United States*, 403 U. S. 573 (1971), is instructive on the issue of credibility. "I think there is much truth in the government's supporting assertion that the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis . . ." *Id.*, 599. Justice Harlan continued, "without violating the confidence of his source, the agent surely could describe for the magistrate such things as the informer's general background, employment, personal attributes that enable him to observe and relate accurately, position in the community, reputation with others, personal connection with the suspect, any circumstances which suggest the probable absence of any motivation to falsify, the apparent motivation for supplying the information, the presence or absence of a criminal record or association with known criminals, and the like." *Id.*, 600.

Nevertheless, the complaint at issue provided an insufficient basis for an independent determination by a neutral magistrate that probable cause existed. Thus the evidence was properly suppressed. To sustain this warrant would be to dilute the "important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry". *Spinelli vs. United States*, 393 U. S. 410, 419 (1969).

BY THE COURT:

RICHARD S. LOWE,
P. J.

Opinion of the Superior Court of Pennsylvania by the Honorable Gwilyn A. Price, Jr. dated March 2, 1979

IN THE
SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

CARL GELFONT.

No. 1807 October Term, 1978

Appeal from the Order of the Court of Common Pleas of Montgomery County, Criminal Division at No. 712-78.

BEFORE: PRICE, SPAETH and WATKINS, *JJ.*

FILED MAR 2 1979

OPINION BY PRICE, *J.*

This is an appeal from an order of the court below granting appellee's motion to suppress the physical evidence seized pursuant to a search warrant executed at the appellee's residence at an address within Montgomery County. The physical evidence involved is approximately fifteen (15) pounds of marijuana, and the appellant certifies and the court below found that the physical evidence is critical to the Commonwealth's presentation of the case. The Commonwealth is therefore clearly entitled to bring this appeal. *Commonwealth v. Bosurgi*, 411 Pa. 56, 190 A.2d 304 (1963).

The sole issue before us is whether or not the affidavit supporting the issuance of the search warrant provided a sufficient basis for the magistrate to have had probable cause established to justify issuance of the search warrant. We find by applying the test of *Aguilar v. Texas*, 378 U. S. 108 (1964), and subsequent Pennsylvania authorities on the point that the court below erred in the suppression, that the order should be reversed and the case remanded for trial.

President Judge Lowe, of the Court of Common Pleas of Montgomery County, the court below, issued the order and able opinion in support of his order. The facts set forth in that opinion are as follows:

> "On February 22, 1978 Montgomery County Detective Timothy Woodward sought a search warrant for the residence of defendant Carl Gelfont. The complaint for the warrant read in pertinent part:
>
> During the last 24 hours affiant interviewed a confidential and reliable informant. The information received from the confidential and reliable informant was that during the last 48 hours, while he (the informant) was present inside the residence located at 3918 Warfield Drive, Huntingdon Valley, he (the informant) observed a large quantity of suspected marijuana. The marijuana was in the possession of a white male known to the informant as Carl . . . Affiant checked the 'Coles Directorey [sic]' and learned thru that directory that the residence at 3918 Warfield Drive, Huntington [sic] Valley is owned by a Carl Gelfont and learned that a Pennsylvania Operators License is issued to a Carl Gelfont, d. o. b. 2/9/42, 3918 Warfield Drive, Huntington [sic] Valley. Affiant believes the informant to be reliable for the following reasons: The informant has never been arrested or a

> suspect in a crime. The informant has been gainfully employed for the majority of his adult life. The informant is also a registered voter in Montgomery County. . .
>
> After a determination of probable cause, District Justice Everett P. Arnold issued the warrant.
>
> Detective Woodward proceeded to the defendant's residence, executed the warrant, seized contraband, and arrested the defendant for violations of the Controlled Substance, Drug, Device and Cosmetic Act. Act of April 14, 1972, P. L. 233, 35 P. S. 780-113 (a) (16), (30)."

The key words to the decision of the court below were the words "suspected marijuana" in the sentence of the affidavit ". . .while he (the informant) was present inside the residence located at 3918 Warfield Drive, Huntingdon Valley, he (the informant) observed a large quantity of *suspected marijuana.*" (emphasis supplied).

Speaking to this point and discussing *Aguilar v. Texas, supra,* the opinion of the court below explains:

> "Each prong of the test must be analyzed separately. The first requirement is an explanation of the underlying circumstances which caused the informant to believe that fruits of a crime would be found. This warrant merely states that the informant 'observed a large quantity of suspected marijuana.' (emphasis added). The affidavit stated that the suspected marijuana was in the possession of a certain individual named Carl at a designated location. This portion of the affidavit lacks the requisite underlying 'facts or circumstances' which gave rise to the informant's conclusions. There is nothing in the affidavit to indicate that the informant had any expertise in marijuana or that he could distinguish marijuana from other vegetable substances of similar appearance and

characteristics. Unquestionably, before a lay informant's opinion can support the issuance of a search warrant, it must be demonstrated he has had some prior elementary experience with the subject matter of the opinion. The Supreme Court of the United States forbids issuance of a warrant on mere affirmance or belief. In *Nathanson v. United States*, 290 U.S. 41 (1933), a warrant was issued upon the sworn allegation that the affiant 'has cause to suspect and does believe' that certain merchandise was in a specified location. The Court stated:

> Under the Fourth Amendment an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

Id. 47. See also *United States v. Harris*, 403 U.S. 573 (1971). The informant merely suspected that marijuana was present at defendant's residence. Mere affirmance is insufficient. There is no allegation that the informant, a reputable, law-abiding citizen, had any knowledge of marijuana. It cannot be assumed that marijuana is such a common, every day substance that it is readily and universally recognizable. Expert witnesses are often called upon to identify marijuana. *United States vs. Moore*, 446 F.2d 448 (3rd Cir. 1971), *cert. denied*, 406 U. S. 909 (1971). The meager, unconfirmed, and unsubstantiated allegations identifying the *suspected* contraband as marijuana are insufficient to satisfy the first prong essential to establishing probable cause."

We believe this analysis to be in error. As Justice Frankfurter pointed out in *Jones v. United States*, 362 U.S. 257 (1960), in examining an affidavit the magistrate issuing the warrant

> "need not have been convinced of the presence of narcotics [at the place to be searched. Rather there need only be a] *substantial basis* for him to conclude that narcotics were probably present." *Id.* at 271 (emphasis supplied).

Additional valuable instruction is gained on the standard of review in *United States v. Ventresca*, 380 U.S. 102 (1965), where the Court stated:

> "[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* at 109. (citation omitted).

Indeed, this court has often used the above language in upholding such warrants, most recently in *Commonwealth v. Foster*, ... Pa. Superior Ct. ...., 385 A.2d 416 (1978) (*Allocatur denied* June 21, 1978). In *Foster*, the drug involved was identified as T. H. C. *only* through the use of the letters T. H. C. in a conversation overheard by the informant. The substance was never seen and therefore was further removed from specific identification than the physical evidence here involved.

In the instant case, the court below has applied too strict a standard. The information that a confidential reliable informant provides law enforcement authorities in order for them to procure a search warrant has never been held to be a standard of proof beyond a reasonable doubt. This court has repeatedly held that the correct test is by evidence less than would justify conviction. The use of the word "suspected" must, of necessity, at least be implied in all search warrants. Even the most experienced of law enforcement officials can only *truly* apply a drug name to a substance after standard chemical tests are performed, most often requiring the use of highly trained and specialized experts to identify *truly* the drug. Indeed, the court below recognized that distinction in its opinion.

Further, in *Commonwealth v. Banahasky*, 250 Pa. Superior Ct. 495, 378 A.2d 1257 (1977), Judge Spaeth, speaking for the majority, accepted the words "suspected marijuana" as establishing the fact that some drugs were found on an individual's person.[1] That opinion, while accepting "suspected marijuana," went on to reverse on other grounds, a conclusion which led the writer of this opinion to dissent. But on the point here under discussion there was no division.

Appellee also argues the suppression order should be affirmed because the court below erred in its interpretation of the second prong of the *Aguilar, supra*, requirement. On that point, the court below's opinion is as follows:

> "The leading case analyzing the second requirement of the *Aguilar* test is *United States vs. Harris, supra.* The courts of Pennsylvania have reviewed the requisite stan-

[1] The dissent now justifies that reliance because of the fact that the informant was a chief of police. This is an example of fallacy known as *petitio principii.* It is not a fact which establishes the ability to translate the words "suspected marijuana" into "truly marijuana."

> dards in determining whether or not there is a substantial basis for crediting hearsay:
>
> 1) Did the informant give prior reliable information?
>
> 2) Was the informant's story corroborated by any other source?
>
> 3) Were the informant's statements a declaration against interest?
>
> 4) Does the defendant's reputation support the informant's tip?
>
> *Commonwealth vs. Ambers*, 225 Pa. Superior Ct. 381 (1973); *Commonwealth vs. Reisinger, supra.* None of the aforementioned factors is present in the instant case. However, these factors were not 'intended by the Harris court to be the only factors which could conceivably provide a basis for crediting the hearsay.[1] To apply this "checklist" in a mechanical manner would deprive a reviewing court of the opportunity to use its "common sense" as urged the Court in *United States vs. Ventresca* [380 U.S. 102 (1965)] . . .' *Commonwealth v. Reisinger, supra*, 380 A.2d 1250, 1253.

Footnote 1 of the quoted portion of the court below's opinion is as follows:

> "Justice Harlan's dissent in *Harris vs. United States*, 403 U.S. 573 (1971), is instructive on the issue of credibility. 'I think there is much truth in the government's supporting assertion that the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis . . .' *Id.*, 599. Justice Harlan continued, 'without violating the confidence of his source, the agent surely could describe for the magistrate such things as the informer's general background, employment, personal attributes that enable him to observe and relate accurately, position in the community, reputation with others, personal connection with the suspect, any circumstances which suggest the probable absence of any motivation to falsify, the apparent motivation for supplying the information, the presence or absence of a criminal record or association with known criminals, and the like.' *Id.*, 600."

This Court concludes that there is sufficient evidence to determine that the second requirement of *Aguilar* was met. The informant was reliable because he had never been arrested or a suspect in a crime, is gainfully employed, and is a registered elector in Montgomery County."

We agree.

The suppression order is reversed and the case remanded for trial.

SPAETH, *J.*, files a dissenting opinion.

Dissenting Opinion in the Superior Court of Pennsylvania by the Honorable Edmund B. Spaeth, Jr. dated March 2, 1979

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

CARL GELFONT.

No. 1807 October Term 1978

Appeal from the Order of the Court of Common Pleas of Montgomery County Criminal Div. at No. 712-78.

BEFORE PRICE, SPAETH and WATKINS, *JJ.*

FILED MAR 2 1979

DISSENTING OPINION BY SPAETH, *J.*:

On February 22, 1978, the Commonwealth obtained and executed a warrant to search appellant's residence. Marijuana was found and appellee was arrested and indicted. Following a suppression hearing on June 6, 1978, however, all evidence obtained as a result of the search was suppressed by the lower court on the ground that the search warrant was issued without probable cause. The Commonwealth appeals from this ruling.[1]

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[1] As the majority notes, because the record shows that the suppressed evidence is critical to the prosecution of this case, the Commonwealth is entitled to bring its appeal. Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304, *cert. denied* 375 U.S. 910 (1963); Commonwealth v. Reisinger, ... Pa. Superior Ct. ...., 380 A.2d 1250 (1977).

The warrant was issued upon the following affidavit of probable cause:

> During the last 24 hours affiant interviewed a confidential and reliable informant. The information received from the confidential and reliable informant was that during the last 48 hours, while he (the informant) was present inside the residence located at 3918 Warfield Drive, Huntingdon Valley, he (the informant) observed a large quantity of suspected Marijuana. The Marijuana was in the possession of white male known to the informant as Carl. Carl is described by the informant being 6'2 and weighting approximately 300 pounds. Affiant checked the "Coles Directorey" and learned thru that directory that the residence at 3918 Warfield Drive, Huntingdon Valley is owned by a Carl Gelfont. Affiant also checked the Pennsylvania Bureau of Motor Vehicles and learned that a Pennsylvania Operators License is issued to a Carl Gelfont, d.o.b. 2/9/42, 3918 Warfield Drive. Huntingdon Valley. Affiant believes the informant to be reliable for the following reasons: The informant has never been arrested or a suspect in a crime. The informant has been gainfully employed for the majority of his adult life. The informant is also a registered voter in Montgomery County. Finally, Affiant believes the informant to be reliable due to the fact that the information given to Affiant by the informant relative to the owner of the residence located at 3918 Warfield Drive Huntingdon Valley, and a description of the residence thereof, has been substantiated by the Cole's Directory, Pennsylvania Bureau of Motor Vehicles and Lower Moreland Township Tax Records. As a result of the above information given to Affiant by the confidential and reliable informant, Affiant believes the confidential and reliable informant to be of sound reasoning and not prone to rash judgements.

In *Aguilar v. Texas*, 378 U.S. 108 (1964), the United States Supreme Court considered the constitutionality of a search warrant based on hearsay information given by an unidentified informant. The Court held that such a warrant is lawful only when the issuing magistrate has been "informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' " *Id.* at 114-115. *See also United States v. Harris*, 403 U.S. 573 (1971); *Spinelli v. United States*, 393 U.S. 410 (1969). We have interpreted this holding to mean that in order for such a warrant to be valid, "the issuing authority must by reference to the information in the affidavit be able to answer two questions: (1) Do I have enough information to warrant the belief that the informant *could* know what the officer says she told him she knew? And (2) If I do have enough such information, do I also have enough information to warrant the belief that [the informant] *did* know it?" *Commonwealth v. Purcell*, ... Pa. Superior Ct. ....., 380 A.2d 914, 917 (1977) (plurality opinion) (original emphasis). *See also Commonwealth v. Davis*, 466 Pa. 102, ... A.2d .... (1976); *Commonwealth v. Kline*, 234 Pa. Superior Ct. 12, 335 A.2d 361 (1975); *Commonwealth v. Archer*, 238 Pa. Superior Ct. 103, ... A.2d .... (1975).

Here the issuing magistrate had sufficient information to conclude that if appellee possessed marijuana, the informant could have observed it when he was at appellee's residence. The magistrate, however, did not have sufficient information to conclude that appellant's assertion was reliable that the substance he saw at appellant's residence was marijuana.

The requirement that an issuing magistrate be informed of the underlying circumstances from which the affiant for a search warrant concluded that the information he received from his informant is reliable is satisfied only if there is reason for the issuing magistrate "to believe both that the informer is a truthful person generally and that he has based his particular conclusions in the matter at hand on reliable data . . . ." *United States v. Harris, supra* at 588 (HARLAN, J., dissenting), *quoted in Commonwealth v. Slater,* 242 Pa. Superior Ct. 255, 257-58, 363 A.2d 1257, ... (1976). *See also Commonwealth v. Emerich,* 225 Pa. Superior Ct. 163, 310 A.2d 390 (1973) (no probable cause despite tips from respected and generally credible members of the community because the dependability of their information was not shown). The affiant here endeavored to establish the reliability of his informant by asserting that he was a registered voter, was employed, and had no criminal record. Even if we assume that these facts are sufficient to show that the informant was generally truthful,[2] they do not show that his observations provided reliable data from which he could have reasonably concluded that appellant possessed marijuana. As the lower court pointed out, the affidavit presented to the magistrate did not state that the informant possessed any knowledge of marijuana that would enable him to distinguish marijuana from other vegetable substances of similar appearance and characteristics. Slip opinion at 3-4. In past cases, we have upheld a warrant where the accompanying affidavit indicated that the informant was

[2] Whether the affidavit was sufficient to show the informant's general truthfulness is by no means certain. *See generally* In re Burton, ... Pa. Superior Ct. ....., ... A.2d .... (J. 382/77, filed Oct. 20, 1978) (no probable cause where only reasons to believe informant were that informant had "nothing to gain by informing" and came from a family of "noted upstanding citizens of the community"); Commonwealth v. Slater, *supra* (no probable cause where unidentified informant swore before affiant that the information he was giving was truthful).

familiar with narcotics or contained other facts to show that the observed substances were probably contraband. *See Commonwealth v. Cosby,* .... Pa. Superior Ct. ....., 335 A.2d 531 (1975) (probable cause present where named informant with no ulterior motive entered defendant's apartment and saw packet with white powder, powder residue, and tube on album cover); *Commonwealth v. DiSantis,* 222 Pa. Superior Ct. 387, 294 A.2d 789 (1972) (probable cause present where undercover narcotics agent saw marijuana and marijuana cigarette on defendant's premises); *Commonwealth v. Somershoe,* 215 Pa. Superior Ct. 246, 257 A.2d 341 (1969) (probable cause where informant with record of narcotics involvement saw marijuana in defendant's house and defendant had been arrested a month before on another narcotics charge); *see also Rutherford v. Cupp,* 508 F.2d 122 (9th Cir. 1974), *cert. denied,* 421 U.S. 933 (1975) (probable cause where neighbor brought sample of plant growing in defendant's yard to police and sample proved to be marijuana). However, until today, we had yet to take judicial notice of the (unproved) fact that the use of marijuana has become so universal that it is readily recognizable by law-abiding citizens. *See Commonwealth v. Purcell, supra* at ..... 380 A.2d at 917 (no probable cause where facts recited in affidavit did not warrant belief that informant knew what a marijuana plant looked like). The majority takes such notice, and in doing so, I submit, it errs. A judicially noticed fact must be one not subject to reasonable dispute. *See* Fed. R. Evid. 201(b) and Advisory Committee's comment. It is true that the use of marijuana has risen dramatically over the past decade. *See* Glaser, *Interlocking Dualities in Drug Use, Drug Control, and Crime,* in DRUGS AND THE CRIMINAL JUSTICE SYSTEM 45 (Inciardi and Chambers ed. 1974) (42% of American students in 1970 had used marijuana and more recent surveys indicate a higher

percentage of users). Still, 1971 surveys indicated that only 13% of all white collar and only 15% of all blue collar workers had some marijuana experience. *Id.* Given these statistics, whether the average law-abiding citizen is able to recognize marijuana is at least subject to reasonable dispute since the ability to recognize it is not innate but is attained only after training or illicit familiarity.[3]

I am aware that in determining the sufficiency of an affidavit of probable cause for a search warrant

> only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U.S. 89, 96, 13 L.Ed. 2d 142, 147, 85 S. Ct. 223 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300, 311, 18 L.Ed. 2d 62, 70, 87 S. Ct. 1056 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U.S. 102, 108, 13 L.Ed. 2d 684, 688, 85 S. Ct. 741 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U.S. 257, 270-271, 4 L.Ed. 2d 697, 707, 708, 80 S. Ct. 725, 78 ALR 2d 233 (1960).
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> *Spinelli v. United States, supra* at 419.

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[3] One further fact may be noted. As appears in the affidavit quoted *supra*, the affiant also said that he believed the informant to be reliable because the informant's assertion that appellee lived at 3918 Warfield Drive had been verified. This verification, however, could not establish the reliability of the informant's assertion that appellant possessed marijuana at the residence. *See generally* Commonwealth v. Devine, 233 Pa. Superior Ct. 99, ... A.2d .... (1975).

Still, the fact remains that the affidavit here set forth no facts to establish the reasonableness of the informant's suspicion that appellant possessed marijuana.[4] No assertion was made that the informant had ever seen marijuana before. Nor did the magistrate know the age and background of the informant. He knew that he was not a student, for the affidavit states that he "has been gainfully employed for the majority of his adult life." He may have been a recent graduate, but the statistical probability is that he is a member of the larger class of middle-aged and senior citizens. Nor did the affidavit assert that appellee told the informant that the substance he observed was marijuana, or that the informant saw appellee using or manufacturing the substance, or that appellee had a prior record involving narcotics violations.

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[4] The marjority's emphasis on the particular words used in the affidavit misconstrues this opinion and, I believe, the opinion of the lower court. The search warrant lacked probable cause not because the words "suspected marijuana" were used in the affidavit, but because of the absence of any facts from which the magistrate could have concluded that the informant had a reasonable basis for claiming that the substance he saw was marijuana. *Commonwealth v. Banahasky*, 250 Pa. Superior Ct. 495, 378 A.2d 1257 (1977), which is cited by the majority, is not only entirely consistent with this dissent, but proves the point I make. In *Banahasky*, the informant was a chief of police. From this fact the magistrate who issued the search warrant could have reasonably concluded that the informant was familiar with narcotics and that his suspicion was probably accurate that the substance he found on the suspect was marijuana.

Also, I note that although both the majority and the lower court have treated the issue of the informant's ability to recognize marijuana as involving the first prong of the test established in Aguilar v. Texas, (*i.e.*, as involving the circumstances from which the informant concluded that narcotics were where he claimed they were), I have treated the issue as involving the second prong (*i.e.*, as involving reliability), believing that by doing so the questions presented will be focused more clearly.

Appendix—Dissenting Opinion in the Superior Court of Pennsylvania.

In most cases, the reliability of an informant is satisfied by police reliance on information that has in the past led to arrests and convictions. Of course, there is always a first time for every informant, as the present case demonstrates. Our cases hold that the police should not discourage law-abiding citizens from coming forward with information of criminal conduct, but neither should the police be exempted from testing the reliability of the information they receive merely to accommodate their informants. *Commonwealth v. Slater, supra* at 258, ... A.2d at ..... To hold otherwise, in order to validate warrants like the one involved here, would be to infringe upon the public's legitimate expectation that a person will not be subject to search and seizure whenever another has lifted an accusatory finger, absent a preliminary testing of the rationality of the accusation.

I would affirm.

Judgment of the Superior Court of Pennsylvania dated March 2, 1979

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

CARL GELFONT.

No. 1807 October Term, 1978

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of MONTGOMERY County be, and the same is hereby REVERSED AND THE CASE REMANDED FOR TRIAL.

BY THE COURT:

J. HANIEL HENRY,
Prothonotary.

Dated: March 2, 1979.

Judgment of the Supreme Court of Pennsylvania dated June 4, 1979

NO. 421 ALLOCATUR DOCKET

COMMONWEALTH OF PENNSYLVANIA,

v.

CARL GELFONT,

Petitioner.

FOR PETITIONER:

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FOR RESPONDENT:

William T. Nicholas
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3/29/79. PAA from Superior Court at No. 1807 October Term 1978, filed.

6/4/79. Denied. P. C.